

## The Basis and Nature of A Rights-Based Approach to Housing Policy

Christopher Essert<sup>1</sup>

This idea paper is a response to the *Discussion Paper: A Human Rights-Based Approach to Housing*. It begins with a discussion of the basis of the human right to housing, namely avoidance of the wrong of homelessness. The discussion of homelessness transitions into a brief treatment of the content of the right to housing. After that, there is an application of the ideas developed to the more specific question of the ways in which a rights-based approach to housing should affect the National Housing Strategy.

### Homeless and Housing

To understand a human right to housing, to know why depriving someone of housing is a violation of their human rights, we need to know the nature of the benefit that housing provides and, thus, the nature of the deprivation that is suffered by those who are unhoused. We should understand the right to housing by first considering homelessness. Homelessness is the condition of those whose right to housing has been most egregiously violated. If we begin by understanding homelessness and what about it is so wrongful, we will be able better to see the importance of a human right to housing, to see what it protects against.

We should understand homelessness paradigmatically in terms of a deprivation of the right to keep others out of a space, to have a space of one's own in which to do one's own things.<sup>2</sup> Providing this space of one's own, where one is free to pursue one's own chosen plans and projects, is what housing is for and what a human right to housing protects. Canadians who are adequately housed are able to live their lives as they choose to, whereas Canadians who are inadequately housed are not: they are constantly at the mercy of others in respect of how and where they may conduct some of the most personal and private parts of their lives.

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<sup>1</sup> Queen's University Faculty of Law.

<sup>2</sup> In common law systems, this is essentially what is provided by property rights — ownership and residential tenancy rights most prominently. But we do not need to focus too much on the label in this context, it is the substance that matters.

Not everyone who is inadequately housed is homeless. But we can gain significant insight into housing, and a human rights-based approach to housing, by concentrating on homelessness, understood as the situation where the human right to housing is most extremely and egregiously infringed.

As theorists have argued, to be homeless is to be subject to a pervasived subordination and denial of freedom.<sup>3</sup> This is relatively easy to see in respect of the street homeless. Someone who lives on the street is very often unable to access a space to perform even the most basic human functions — sleeping, eating, bathing, urinating — either at all, or without a permission that is and may legally be granted or withheld on grounds that are, from the point of view of the importance of the need being addressed, arbitrary. (Sometimes the homeless are allowed, say, to use the bathroom in a coffee shop or to bathe at a community centre; but these permissions are granted or withheld by the operators of these spaces on their own terms and need not, legally, take into account the needs of the homeless.) The increasing recognition of this idea by Canadian courts has led to holdings that municipal bylaws that restrict the freedom of the homeless to sleep in public parks, for example, counts as an infringement of their rights under s. 7 of the *Charter*.<sup>4</sup> But that is only the beginning of the problem.

It is generally recognized that the class of the homeless includes not only those living on the street but also those staying in emergency shelters. Many homelessness advocates and researchers also include the ‘hidden homeless,’ generally understood as those who are staying on a temporary or *ad hoc* basis with friends or family, as long-term guests or couch-surfers, without any rights to the space where they spend the night.<sup>5</sup> Because this group often does have shelter, they are sometimes overlooked in thinking about homelessness. But we should notice the ways in which they, too, are significantly under the power of those with whom they stay, and the ways

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<sup>3</sup> The best-known treatment is Jeremy Waldron, “Homelessness and the Issue of Freedom” 39 *UCLA Law Review* 295 (1991). My own account, which closely tracks the argument here, is in Christopher Essert, “Property and Homelessness” 44 *Philosophy & Public Affairs* 266 (2016). Another discussion is found in Terry Skolnik, “How Homeless People Are (And Can Be) Regulated Differently than People with Access to Housing” (2018) 43 *Queens Law Journal* (*forthcoming*).

<sup>4</sup> See eg. *Victoria (City) v Adams*, 2009 BCCA 172, affirming *Victoria (City) v Adams*, 2008 BCSC 1363. The remedies provided in this case and other similar cases are, quite obviously, inadequate as a response to the problem of homelessness identified here.

<sup>5</sup> See eg Gaetz, et al (2012) *Canadian Definition of Homelessness*. Toronto: Canadian Observatory on Homelessness Press.

in which these power dynamics often result in significant harm. That is, when having a place for oneself or one's children to sleep for the night depends on staying in the good graces of one's host, one might not feel free to refuse their requests, no matter how demeaning or intrusive.

What ties the members of this disparate group together is that they all lack rights to the space where they stay and, therefore, that their staying and doing the things they do there are subject to the permission of the person whose space it is. A person who has lost her home and is staying in the home of a friend or relative is, from the point of view of her legal rights, in just the same position as someone who lives on the street and uses the coffee shop bathroom or community centre shower. That is, they are in and able to use the relevant space because someone gives them permission to do so. That permission can be revoked at any time for (practically) any reason, and losing it also means losing the ability to use the space and to do the action. When the coffee shop's manager tells the homeless person using the bathroom to move along, she has no grounds to complain. In just the same way, when a homeowner or tenant asks her homeless couch-surfing relative to move along, she has no grounds to complain. And again, in both cases, the fact that the homeless person has no rights to use the space means that she is at the mercy of the person who does. This inequality of rights is inherently problematic and may also be exploited in ways that lead to further harms.

It is this lack of rights in respect of space and the way that it puts a homeless person at the mercy of others that makes someone homeless. While there are many different sorts of things that lead to homelessness, what makes the homeless *homeless* is that they are always and everywhere in space that is held by some other private or public entity, and that they therefore are under the control of that entity in respect of how they may act. To be homeless is to be under the control of others to a degree that has few parallels in contemporary Canadian society. The homeless are denied basic rights in a shockingly fundamental way.

From this point of view — the point of view of homelessness understood as a rights-deprivation — questions about why some given individual is homeless or about if it is in some way her 'fault' are irrelevant, the same way that questions about why someone is sick or injured are irrelevant from the point of view of that person's right to receive health care, or that allegations of wrongdoing do not diminish the right to a fair trial.

Homelessness is not merely a matter of not having a roof over one's head to keep out the rain. Rather it is a matter of not having any way to keep out others. That means that, when one is homeless, one is unable to freely do anything that requires that at least some others be kept out.

As noted above, that means that many of the most basic human activities — sleeping, eating, bathing, urinating — can be performed by the homeless only either wrongfully (illegally) or else when someone else lets them. Sleeping in a shelter is only something that a homeless person can do when the operators of the shelter and the others staying there choose not to interfere. While the problem is from a certain angle most pressing when it comes to these most basic and unavoidable human functions, it applies pervasively to many other aspects of life. Many activities that Canadians with homes of their own take for granted are almost impossible to perform for homeless Canadians. From quietly reading a book by the window, to chatting with a partner in bed, to hosting a child's birthday party, there are innumerable ways that we act and relate to one another that require us to be able to decide who will be present. It's not easy to read a book on a street corner or chat with a partner lying on neighbouring mats at a shelter or host a party at cousin's home. And moreover, even when these things are possible, that is only because someone gives permission. Only a person who has space of her own can securely choose to perform (or not perform) these and an indefinite class of other activities without being at the mercy of others. This is the sense in which homelessness is about a denial of freedom: homeless Canadians are not free, where housed Canadians are, to choose, generally, what activities they want to perform and with whom and on what terms.

### **From Homelessness to A Right to Housing**

The wrongfulness of homelessness and the ways in which the homeless are subject to unfreedom and subordination can be understood to provide the basis for a right to housing. That is, each Canadian has a right to be housed in order that they not be subjected to the fundamental and pervasive denial of freedom that is homelessness. If we understand homelessness in terms of a distinctive kind of deprivation of freedom, then we can see that the right to housing is, in no small part, the right not to be homeless.

This suggests that the right to housing is to be understood not merely in terms of shelter but rather in terms of the distinctive legal position and protection against homelessness that housing provides. And, indeed, this is

how it has been understood. The statement of the United Nations Committee on Economic, Social and Cultural Rights in its general comment No. 4 on the right to adequate housing provides perhaps the best illustration:

The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.<sup>6</sup>

The ideas of security, peace, and dignity referenced by the Committee fit well with the basis of the right offered above. Housing provides its holders with a zone in which they are not under the power of others and so gives them the freedom to pursue their own good life. When the housing is provided securely, it uniquely allows access to certain central elements of peace and dignity. And as I argued above, the homeless, whose right to housing is most egregiously denied, are unable to live in security, peace, and dignity, precisely because they are under the control of others in respect of what they may do and where they may do it.

### **From A Right to Housing to a Housing Strategy**

Taking a rights-based approach to a national housing policy requires that the policy and all of its particular features (procedures, institutions, benefit-allocations, and so on) be designed in a way that recognizes the policy's purpose to be realizing and protecting a human right to housing. This abstract idea is one that is familiar from many other legal and political contexts which are usually understood in rights-based terms. Much of Canadian criminal procedure, for example, can be understood as based on a basic right not to be deprived of liberty (that is, imprisoned) without a trial that adheres to principles of fundamental justice. From this basic right we can derive rules about evidence, about the conduct of members of the justice system, about trials and other judicial proceedings, and so on. The same structure applies in less obviously legal context as well. Most Canadians would understand themselves to have a right to health care, and such an idea of a right generates requirements that all Canadians be treated

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<sup>6</sup> Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991), para. 7.

equally in the provision of such care, even in contexts where providing care to some particular group requires significantly more resources.<sup>7</sup>

This has many important substantive upshots in terms of the design of housing policies and programs. At the most abstract level, we can say that each Canadian ought to be provided with adequate housing, which is just to say that they should be provided with housing that does not make them homeless. This means that housing that is provided must be sufficient to ensure that each Canadian has the capacity in her home to participate in some sufficiently wide set of those valuable activities that make a house a home. Being homeless is being at the mercy of others in respect of what one may do and where; the right to housing is the right not to be in that situation. Vindicating the right requires housing that protects against this kind of subordination. More specific discussions in more specific contexts can and should be understood as elaborating this abstract idea.<sup>8</sup>

For present purposes, what the structure set out here means in the housing context is that *all* elements of the National Housing Strategy need to be understood in terms of the strategy's overarching goal of protecting the rights of all Canadians to adequate housing and not to be homeless. This can be seen by considering the features of the policy highlighted in the *Discussion Paper*.

*Legislation* The contents of the legislation to be enacted to carry out the National Housing Strategy will of course be central to ensuring that the Strategy can truly be said to take a rights-based approach, because the legislation will be the element of the strategy in which the substance of the right can be most fully realized as a matter of law. Thus, the legislation should require that all housing provided as part of the Strategy is provided in a way that recognizes the basis and nature of the right to housing as discussed above, and that communicates clearly and forcefully the elimination of homelessness as the ultimate end goal of all housing policy. That means that being guided by general legal ideas of Accountability, Participation, Non-Discrimination, and Inclusion, while positive, is insufficient. Those ideas are a necessary element of all rights-based legislating. In the housing context, though, they must be accompanied by

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<sup>7</sup> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624.

<sup>8</sup> See again the Committee on Economic, Social and Cultural Rights, general comment No. 4, para. 8, where the right to housing is elaborated in terms of, *inter alia*, legal security of tenure, availability of services, materials, facilities, and infrastructure, habitability, and accessibility.

a clear and explicit commitment to the core content of the Right to Housing itself.

*Federal Housing Advocate* The Advocate should be seen as the primary locus for ensuring and enforcing a rights-based approach to housing. That means that the Advocate and its office must be guaranteed both independence and significant enforcement powers. Taking seriously the idea that Canadians have a right to housing requires that they have at least some capacity to have that right realized, vindicated, protected, and enforced. The Advocate can be seen as an important forum for these processes. Requiring that the Advocate is independent from all policy-making arms of the Federal (and provincial) governments should ensure that the Advocate is free to evaluate and potentially criticize those policies which may fail to adhere to the rights-based framework of the Strategy. Providing the Advocate with at least some enforcement powers would be the best way to ensure that those evaluations and criticisms will be taken seriously.

*Housing Council* The role of the Council, especially vis-à-vis the Advocate, is left somewhat unclear. But the Council has the potential to act as a bridge between the Advocate and Canadians generally, and also to take on a role developing and elaborating the content of the Right to Housing in the Canadian context.

*Community-Based Tenant Initiatives* When it comes to what kind of policies and programs count as adequate from a rights-based point of view, details matter. Therefore, it is and will always be important to ensure that those with on-the-ground involvement and lived experience are provided robust and official means to contribute to policy development.

*Public Engagement Campaign* Given the profound and fundamental wrongfulness of homelessness, it is of the utmost importance that all Canadians are able to see and understand the nature and basis of the human right to housing. Again, the health care and criminal analogies are helpful here. Canadians understand the importance and value of rights-based policy regimes in these contexts, and, with the right kind of public engagement, the same should be true in the housing context.